Supreme Court, U.S.
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No. 02-507

In The

Supreme Court of the United States

CHARLA MARTIN, as special administrator of the Estate of Timijane Martin, CHARLA MARTIN AND TIMOTHY MARTIN, Parents of Timijane Martin,

Petitioners,

vs.

SHAWANO-GRESHAM SCHOOL DISTRICT, WAUSAU UNDERWRITERS INSURANCE COMPANY, RICHARD HESS, JEANNE CRONCE, and ANTHONY MARINACK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the lower court's evidentiary analysis of the Martins' claim conflict with settled summary judgment standards?

2. Do parents of a minor student have a constitutional familial fundamental right concerning school discipline of less than ten days?

3. Does due process pertaining to a student's suspension for three days require more than the student being given an oral notice of the alleged violations, and if the violations are denied, an explanation of the evidence that the school district has to support the charges and an opportunity to present her side of the story?

4. Does the state created danger exception to *DeShaney v. Winnebago County Dept. of Social Services*, 49 U.S. 189 (1989) create a constitutional deprivation absent a state's affirmative act that places one in a position of danger and absent the state actor's culpable knowledge that one was in danger?

5. Is a rational basis standard the appropriate standard to utilize in analyzing the claim in an equal protection claim that does not implicate a fundamental right or disparate treatment of a suspect class?

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STATEMENT OF THE CASE

These respondents believe it is necessary to set forth in some detail the underlying facts of the case in that the petitioners have interwoven the facts with an argument in their Statement of the Case, and as such, have presented a position that is not compatible to the facts known to the participants at the time of this tragic occurrence.

The Court of Appeals did not hold that the Martins had no familial liberty interests. Rather, the Court of Appeals reasoned that the right to familial relations (which is a fundamental right protected by the Constitution) is not implicated in regard to school disciplinary matters; the Court of Appeals did hold that Timijane had received minimal due process protection prior to her suspension; the Court of Appeals did rule Timijane's suspension did not create or increase a risk of danger to Timijane; and held that under the rational basis test, Timijane's suspension did not violate her equal protection rights.

Timijane indeed was a 13-year-old seventh grade student attending the Shawano Community Middle School ("SCMS"), who along with another student, Tabitha Reiter ("Tabitha"), were suspended for three days for possession of a cigarette.

The SCMS had in effect on the day of the suspension a written policy that prohibited the use of tobacco on school premises. The school policy prohibiting the use of smoking materials clearly informed students that a violation of such policy would result in a three-day out of school suspension or a five-day out of school suspension with a referral to the police liaison officer for a citation.

On May 19, 1999, Mr. Marinack, an assistant principal of the middle school, was responsible in part with school discipline and was informed Tabitha was in the possession of cigarettes on school grounds. After Marinack searched Tabitha's locker she was summoned to his office where he confronted her regarding the cigarettes and ultimately suspended her from school for three days.

While Tabitha was in Marinack's office, she provided for him her mother's work number. Marinack then called Tabitha's mother and initially after being unable to reach her left a message for her regarding Tabitha's suspension. The phone call placed to Tabitha's mother was placed before 2:30 p.m. which is the end of the school day.

While still in Marinack's office, Tabitha informed him Timijane also had possession of cigarettes. Having obtained information that Timijane may have possession of banned material Marinack had her excused from class. When Marinack met Timijane he asked her if she had any cigarettes. Timijane responded by denying having possession of any cigarettes.

After receiving the denial from Timijane that she was in possession of banned material Marinack proceeded to search her locker. While searching Timijane's locker Marinack again asked her if she had possession of the banned items. Again, Timijane denied possession of any cigarettes. In the course of searching Timijane's locker Marinack did in fact find a cigarette rolled up in a sock. After the cigarette was found Timijane gave Marinack the explanation that she was holding the cigarette for another student.

Subsequent to Marinack finding the cigarette in Timijane's locker he informed her it was against school

policy to possess tobacco on school grounds and informed Timijane she would be suspended from school for three days. Timijane then returned to the classroom she had been called out of to retrieve her books and returned with Marinack to his office.

While petitioners place great stress on several students' observations of Timijane while she was in the hallway by her locker and while she was in Marinack's office, others also had the opportunity to observe Marinack and Timijane. Kathy Mailahan, a school secretary, observed Timijane as she arrived in the office. Mailahan stated Timijane was not crying, nor did it appear she had been crying. However, Mailahan also observed Timijane leaving the office, and while she was able to observe that Timijane was crying hard as she left the office, Mailahan stated Timijane was not hysterical and/or hyperventilating.

Another school secretary, Mary Conradt, also observed Timijane as she left Marinack's office. Her only observation was that Timijane was crying and sniffling. Tabitha, who was in Marinack's office during the entire period of time Timijane was present, testified that Marinack never lost his temper, never raised his voice or used any profane language.

Marinack believed Timijane's reaction to her suspension was a normal reaction for a middle grade student who had not been in a lot of trouble previously.

While Timijane was in Marinack's office with Tabitha, Marinack was informed by Timijane after being questioned as to where her parents were that they were both at work, however, Timijane also stated that her father would

be off of work the next day and would come in to school to discuss this disciplinary matter with Marinack.

While Marinack was discussing the suspension with Tabitha and Timijane, Tabitha's mother ("Mrs. Reiter") returned Marinack's previously placed phone call and she requested that her daughter remain in school until she was able to get to the school to pick her up. The phone call received by Marinack from Mrs. Reiter occurred at 2:28 p.m., and while Marinack was on the phone with Mrs. Reiter the 2:30 p.m. bell rang indicating the school day had ended.

After Marinack concluded his telephone call with Mrs. Reiter he inquired of Timijane if she needed to take the bus home from school. Timijane replied she did. Marinack then inquired of Timijane if she was sure she did not want to wait for him to reach her mother. Again Timijane indicated she would take the bus home. At no time was Marinack informed that Timijane had any plans on how she was going to get home other than she was going to take the bus. Marinack did not send Timijane home to an empty house as alleged but rather he permitted Timijane to leave school at the end of a typical school day. As far as Marinack was aware, Timijane left the school in the ordinary way she did by taking the bus home.

Marinack attempted to reach Timijane's mother in the same manner he tried to reach Tabitha's mother by calling her at home. After not being able to reach her he left a message on her answering machine explaining the situation. While various students observed Timijane after she had interaction with Marinack and after she left Marinack's office, there is no evidence that Marinack observed Timijane after she left his office.

Prior to Timijane's suicide on May 19, 1999, she had discussed committing suicide in three letters to her friend Tabitha along with discussing it on one or two occasions in telephone conversations with Tabitha. Timijane attributed her desire to commit suicide to her feelings that she was "ugly and stupid and fat" and that she could not "get a boyfriend." During the lunch period on the day of Timijane's suicide, she indicated to Tabitha she felt that a former boyfriend had given her a dirty look and that she felt like hanging herself. Tabitha did not talk to anyone regarding Timijane's comment about suicide. At no time did any individual inform the school district, nor did the school district have any knowledge that Timijane had talked about committing suicide.

Subsequent to Timijane departing from school on the bus she committed suicide by hanging herself.

REASONS FOR DENYING THE WRIT

I.

APPROPRIATE STANDARDS PERTAINING TO SUMMARY JUDGMENT WERE FOLLOWED

The lower court's evidentiary analysis of the Martin family's constitutional claim did not conflict with well-settled summary judgment standards. The Court of Appeals cited and applied the appropriate methodology in entertaining and ruling upon respondents' motion for summary judgment. Summary judgment is proper pursuant to Rule 56(c):

> [I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

> genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (citing Fed.R.Civ.P. 56(c)). The Court of Appeals acknowledged that it reviewed the grant of summary judgment for respondents *de novo*, considering the evidence in the light most favorable to the petitioners (the nonmoving party), citing *Shanoff v. Illinois Dept. of Human Servs.,* 258 F.3d 696, 701 (7th Cir. 2001). App. A 5a. The Court of Appeals also cited the standard set forth hereinabove in Rule 56(c). App. A 5a. Petitioners' contention that the lower court disregarded settled summary judgment methodology is unsupported by the record.

On review of a motion for summary judgment, the court must review all of the evidence in the record. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (citations omitted).

Petitioners do not specify which evidence they contend was disregarded by the Court of Appeals, nor do they identify which evidence they contend should have been disregarded by the lower court on review. However, the existence of a factual dispute, in and of itself, is not sufficient to overturn a properly granted motion for summary judgment. "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material*

fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

The Court of Appeals noted that the respondents challenged the petitioners' description of Timijane as hysterical, citing testimony offered by Marinack. However, the Court of Appeals did not rely on the disputed evidence in ruling upon the motion. The Court of Appeals followed settled summary judgment methodology, stating that "for purposes of this motion, we must view the facts in the light most favorable to the plaintiffs." App. A 15a, Fn. 9. The record reflects that the Court of Appeals reviewed all of the evidence in the record, viewing it in the light most favorable to the nonmoving party. The record reflects that the Court of Appeals cited and applied the required methodology for reviewing the district court's order granting respondent's motion for summary judgment. Petitioners' claim that the Court of Appeals failed to follow fundamental summary judgment principles is unsubstantiated, and is grounded solely on the fact that the Court of Appeals did not rule in their favor.

II.

A THREE-DAY SUSPENSION OF A STUDENT FROM SCHOOL DOES NOT IMPLICATE A FAMILIAL FUNDAMENTAL RIGHT UNDER THE DUE PROCESS CLAUSE

Petitioners argue that respondents violated their fundamental right of familial relations, specifically the right of petitioners to the care, custody and control of their daughter, Timijane. The issue presented is whether the temporary suspension of Timijane from school involved the constitutional fundamental right of familial relations.

In addressing the petitioners' equal protection argument, the Court of Appeals rejected the notion that the right to familial relations was involved in petitioners' claim. (App. A, 20a. fn. 12 "The right to familial relations concerns the family relationship, not school disciplinary matters. Therefore, we conclude, as the district court did, that her claim is judged under the rational basis test."). Petitioners assert that the decision of the Court of Appeals conflicts with decisions of this Court regarding family liberty interests and core due process principles. This Court has not held that fundamental familial liberty interests are implicated when a minor student is temporarily suspended from school.

Petitioners' reliance on *Troxel v. Granville*, 530 U.S. 57 (2000) is misplaced. *Troxel* involved a visitation petition filed by the grandparents of two children following the death of their father, which was found to be an unconstitutional infringement on the mother's fundamental right to make decisions concerning the care, custody and control of her daughters. *Santosky v. Kramer*, 455 U.S. 745 (1982) involved the termination by the State of parental custody rights and removal of the children from the parents' home. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) involved the rights of individuals to live in a single residence as a "family" pursuant to the local housing ordinance. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the issue was whether the State could compel Amish parents to send their children to school until age 16. *Stanley v. Illinois*, 405 U.S. 645 (1972) involved the custodial rights of an unwed father. *Prince v. Massachusetts*, 321 U.S. 158 (1944) involved the rights of a parent to have her children distribute religious solicitation materials in violation of state child labor laws. *Meyer v. Nebraska*, 262 U.S. 390

(1923), involved the rights of an individual that had been convicted for violating state law by his teaching a student reading in a foreign language before the student had reached a specific age and proficiency. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) involved the Compulsory Education Act of 1922.

The temporary suspension of a child from school does not involve familial liberty interests because it does not interfere with the familial relationship between a child and parent. The temporary suspension interferes with the child's education, not with the child's relationship with its parents or with the parents' custody of the child. The cases cited by petitioner are vastly different from the case at bar and do not support petitioner's claim that a fundamental liberty interest is implicated in their child's temporary suspension from school. *Parham v. J.R.*, 442 U.S. 584 (1979) involved the rights of children when voluntarily committed to a mental facility by their parents. It does not support petitioners' argument in support of the petition for review.

There is no split among the lower courts regarding this issue. Petitioners have not pointed to any cases of the federal Courts of Appeal that support their proposition that a temporary suspension from school affects a child and/or parents' fundamental interest in the family relationship. The 10th Circuit case cited by petitioners, *J.B. v. Washington County*, 127 F.3d 919 (10th Cir. 1997) involved the removal of a child from her parents' home pending a child abuse investigation. The factual scenarios of the "family liberty interest" cases cited by petitioners are distinguishable from the facts of the case at bar. Therefore, the authority cited does not support the proposition that a temporary school suspension involves the established

fundamental right of familial relations and the parents' care and custody of a child. Petitioners' claims that they were entitled to parental notification before Timijane's temporary school suspension may implicate procedural due process rights, but such claims do not implicate the fundamental constitutional right of family relations.

Petitioners' due process claim does not involve a fundamental right because educational rights, not family interests, are at issue. This Court has expressly rejected the notion that education is a fundamental right. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 29-39 (1973). *See also Papasan v. Allain*, 478 U.S. 265, 284-85 ([e]ducation is not among the rights afforded explicit protection under our Federal Constitution). *See also Plyler v. Doe*, 457 U.S. 202, 223-24 (1982) (it is undeniable that education is not a fundamental right in the sense that it is constitutionally guaranteed). This Court has expressed grave concern over expanding the scope of fundamental rights afforded protection under the Due Process Clause. *See Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) ("In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' . . . but also that it be an interest traditionally protected by our society. . . . The Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'") (citations omitted). The Court explained the reluctance to expand the scope of fundamental rights in its decision in *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986):

> . . . Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process

> Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of th[e] [Due Process] Clauses [of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. . . .

There are no decisions of this Court holding that the familial liberty interest which has been deemed a fundamental right to include the rights of parents to parental notification for a child's temporary suspension from school. Petitioners are asking this Court to redefine the category of familial relation rights that have been deemed to be fundamental.

The conduct complained of by petitioners involves the temporary suspension of Timijane from school by the respondents. Educational rights are at issue, not family interests or liberty rights. Since education is not a fundamental right, a temporary suspension from school does not involve a fundamental right. Strict scrutiny is not the appropriate standard of review of respondents' conduct.

III.

THE COURT OF APPEALS APPLIED THE APPROPRIATE STANDARD IN ANALYZING THE PETITIONERS' PROCEDURAL DUE PROCESS CLAIM

The lower court ruling that Timijane was not denied procedural due process is not in conflict with any other Court of Appeals decisions and is consistent with the holdings of this court.

Petitioners have taken issue with the lower court's ruling which held that the SCMS complied with the mandates of the procedural due process clause as established by the Constitution.

Petitioners assert the lower court misapplied and misstated the holding of *Goss v. Lopez*, 419 U.S. 565 (1975). Clearly, under *Goss* the student has a right to only minimal due process. *Goss* stated "due process requires in connection with a suspension of ten days or less, that the student be given oral or written notice of the charges against him, and if he denies them an explanation of the evidence that the authorities have and an opportunity to present his side of the story". *Id.* at 581 (1975). This proposition of law is not disputed by the petitioners, nor have the petitioners set forth any case law that has expanded the definition of minimal due process for a student prior to a student's suspension of ten days or less.

Petitioners assert that Timijane was denied procedural due process because her parents had no notice of her suspension and had no opportunity to participate in the suspension process prior to her leaving school. However, petitioners have provided no legal support for such a sweeping conclusion and in fact had not supported their

argument with any legal authority that even suggests that the minimal due process standard for student suspensions has been expanded by any court as the petitioners would now urge.

To the contrary "there need be no delay between the time 'notice' is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it occurred. We only hold that, in being given an opportunity to explain his version of the facts at this discussion, the student must be told what he is accused of doing and what the basis of the accusation is." *Goss*, at 582.

It is not disputed that Timijane was notified of the basis of the disciplinary action, was informed of the evidence that supported the alleged violation, and was afforded the opportunity to present her side of the story. Timijane was in fact afforded due process.

Petitioners next assert that Marinack and the SCMC violated its own written policies and state law, thus they assert that such a violation creates a constitutional claim. Even assuming (which is denied) that there was a violation of the school written policy and/or state law, such a violation does not give rise to a constitutional due process claim. Any misconstruction of a statute does not operate as a denial of due process of law under the Fourteenth Amendment since construction of state law is for decision of state courts. *Herbert v. State of Louisiana*, 272 U.S. 312, 316 (1926). Minimal procedural requirements are a matter of federal law and are not diminished by the fact that the state may have specified its own procedures. *Vitek v. Jones*, 445 U.S. 481, 491 (1980). In other words, the

standard of due process is federal. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 541 (1985). "The right to due process is conferred, not by legislative grace but by constitutional guarantee." *Id.* at 541.

In summary, while the Constitution provides a student with due process rights prior to any suspension, these due process rights are federal and the due process is minimal. The undisputed facts of this case demonstrate the respondents complied with all constitutional mandates. Finally, there is no support for the petitioners' assertion that the Constitution requires pre-suspension parental notification.

IV.

THE LOWER COURT'S HOLDING THAT THERE WAS NO SUBSTANTIVE DUE PROCESS VIOLATION IS CONSISTENT WITH ESTABLISHED CASE PRECEDENT

The lower court's holding that there was no substantive due process violation is not in conflict with any other Court of Appeals' holding and is consistent with prior holdings of this court. In essence, what petitioners are asserting is simply their disagreement with the holding as a result of the lower court's finding that there was no state created danger.

Petitioners are in error when they assert that the stated Created Danger Doctrine was rejected by the lower court. Petitioners misquote and take out of context the lower court's holding. The lower court clearly acknowledged that *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) recognizes that "in certain circumstances the Constitution imposes upon the state

affirmative duties of care to particular individuals." *Id.* at 189. App. A 11a. Further, the lower court specifically acknowledged that such an affirmative duty exists if the state created the danger. App. A 11a. The lower court then after discussing the facts as presented and the controlling case law ruled not that the state created danger exception was inapplicable to a school suspension but that under the facts of this case that the school district did not create or increase a risk to Timijane by suspending her from school even if that act caused her severe emotional distress.

Petitioners assert the lower court concluded that no matter how abusive a school official's conduct may be and no matter how emotionally fragile the child may be that the official owes no duty of care. This assertion is incorrect and is a misreading of the lower court's holding. The lower court simply concluded that the petitioner had not shown that the school authorities used their authority to create an opportunity that would not have otherwise existed for a third party's act to occur. App. A 17a.

Petitioners further assert the lower court ignored evidence regarding Timijane's emotional distress and made impermissible credibility and evidentiary findings in contradiction to settled summary judgment methodology. What the petitioner ignores is that the lower court did in fact consider the very evidence that they presented App. A 15a and concluded "for purposes of this motion we must view the facts in the light most favorable to the plaintiff." App. A 15a, Fn. 9.

While the petitioners have erroneously asserted that the lower court ignored the stated created danger doctrine and while they erroneously assert the lower court erroneously viewed the evidence, they do not establish that these

respondents had any duty or breached any duty which would give rise to a constitutional violation.

Clearly, under *DeShaney*, these respondents did not have an affirmative duty to take any steps as now argued by the petitioner. In *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), the court held the due process clause "purpose was to protect the people from the state, not to ensure that the state protected them from each other." *Id.* at 195-196. The court further explained "nothing in the language of the due process clause requires a state to protect the life, liberty and property of its citizens against invasion by private actors. The clause is phrased as a limitation of the state's power to act, not as a guarantee of certain minimal levels of safety and security." *Id.* at 195. Further, this court has held that the due process clause "forbids the state itself to deprive individuals of life, liberty, or property without due process of law, but its language cannot be extended to impose an affirmative obligation on the state to ensure those interests do not come to harm through other means." *Id.* at 195. Accordingly, it is clear these respondents did not have a duty to take affirmative steps to prevent Timijane from harming herself.

Thus, since these respondents had no duty to act affirmatively to protect Timijane, petitioners assert these respondents' conduct resulted in a state created danger or that the actions of these respondents substantially contributed to the creation of a danger.

While petitioners assert there was a state created danger they fail to establish how the fact that Timijane was suspended created a danger that she would in fact commit suicide. Petitioners argue that these respondents

in some manner altered Timijane's plans to attend a softball practice when she went home on a bus. The decision for Timijane to take the bus home was hers and hers alone. If there was a change in her plans she made the decision and she changed her own plans. There is no evidence that Marinack or any other school official was aware from any source that Timijane had any out of school plans, nor is there any evidence that Timijane was going home in any manner inconsistent with the manner that she always did.

Petitioners cite *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, ___ U.S. ___, ___, 122 S.Ct. 2559, 2565 (2002) for the proposition that a school district has an inherent custodial responsibility in the protection of and safety of the health of students. Such an argument is misplaced. *Earls* involved a Fourth Amendment claim as to whether or not a school district could impose upon a student a suspicionless drug test, not an issue as to the application of a due process clause violation of the Fourteenth Amendment.

While in *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253 (10th Cir. 1998), the Tenth Circuit held that a jury question was presented as to whether there was a "state created danger" as a result of a student's suicide following his suspension, the petitioners misconstrued the lower court's holding as they have done before. The lower court did not reject the *Armijo* holding solely because of the lack of an affirmative act, as the petitioners assert. In the lower court's analysis of *Armijo* the court pointed out that there was a last distinction between suspending a student and allowing the student to go home in the student's normal manner at the conclusion of the school day as compared to suspending a student who was known to be

depressed; known to have talked about suicide on previous occasions; known to have discussed suicide on the day of his suspension; informed a school employee he would be "better off dead"; known to have access to guns at his home; and who was taken out of school during normal school hours and driven home. With this background known the lower court cited to the *Armijo* holding which stated:

> The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, a cutting potential source of private aid. Thus, the environment created by the state actors must be dangers, they must know it is dangerous, and to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party [act] to occur. *Armijo* at 1263.

Thus, the *Armijo* court reasoned that there may be indeed a state created danger not because of the fact that the plaintiff was suspended but because of the defendants' culpable knowledge that the plaintiff at a minimum had mentioned on the day of his suicide that he was contemplating killing himself; that the defendants knew for a period of time that the plaintiff was depressed; that the defendants knew the plaintiff had guns at home; and then the court found that the affirmative act of taking him out of school during school hours and the affirmative act of driving him home and leaving him at his home created the opportunity to commit suicide.

In the case before the bar there is no such affirmative act and Timijane was left exactly in the same situation

that she would have been if she had never had any contact with Marinack and if she had never been suspended as she was free to and permitted to leave school in any manner she so chose in the normal fashion she normally left the school and that she left the school at the end of the typical school day.

Yet another reason for denying the petition is regardless of whether or not there was a state created danger, Marinack's conduct in suspending Timijane and allowing her to leave the school at the end of the school day in the manner in which she described (taking the school bus home even though she may have been emotionally upset) is not conduct that violates the parameters of her constitutional rights. Marinack's conduct must be evaluated in the context of a substantive due process violation as conduct that "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 848-849 (1998). This conscience-shocking requirement is intended to prevent substantive due process analysis from supplementing tort law. As stated by this court:

> Thus, we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. In *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160-1161, 47 L.Ed.2d 405 (1976), for example, we explained that the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States," and in *Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct., at 665, we reaffirmed the point that "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law

> in laying down rules of conduct to regulate liability for injuries that attend living together in society." We have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. See *id.*, at 328, 106 S.Ct., at 663.

Conscience-shocking behavior is not present in the instant case. There is not a scintilla of evidence that Marinack was aware that Timijane was depressed at any time, nor is there a scintilla of evidence known to the school district that Timijane had at any time discussed suicide with any person, nor is there a scintilla of evidence that the school district was in any manner aware that Timijane had any suicidal ideology. There is no evidence that Marinack abused his authority or used it as an instrument of oppression as required for a due process violation. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 126 (1992). As such, Marinack's conduct at worst was negligent for which no constitutional claim can lie.

V.

THE RATIONAL BASIS STANDARD IS THE APPROPRIATE STANDARD TO BE USED IN ANALYZING AN EQUAL PROTECTION CLAIM THAT DOES NOT IMPLICATE A FUNDAMENTAL RIGHT

The lower court reviewed petitioners' equal protection claim using the rational basis standard. Two issues are raised by the petition with regard to the petitioners' equal

protection claim. The first issue raised by the petition is whether the rational basis standard is the appropriate test to utilize in analyzing a claim that does not implicate a fundamental right or involve a suspect class. The second issue raised is whether a rational basis existed for the difference in treatment between Timijane and Tabitha.

Petitioners have not asserted that Timijane was a member of a suspect class. As set forth hereinabove, this Court has established that education is not a fundamental right. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973). A classification involving neither fundamental rights nor a suspect class is accorded a strong presumption of validity. *Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993) (citations omitted). Absent either a fundamental right or a suspect class, a court need only apply a rational basis to review the challenged state action. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

The Court of Appeals analyzed Timijane's equal protection claim as a "class of one" claim pursuant to *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). In *Village of Willowbrook*, this Court held that an equal protection claim may be brought by a "class of one" where "the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.*, 528 U.S. at 564 (citations omitted). The Court of Appeal found that a rational basis existed for the difference in treatment of Timijane and Tabitha.

Petitioners request review of the lower court's ruling because they contend that a fundamental right was involved. For the reasons set forth hereinabove, this Court

should reject such argument. The temporary suspension of Timijane involved education rights, which are not fundamental. The familial liberty interests involving a parent's care, custody and control of their child were not implicated by the temporary suspension of Timijane. There is no split of authority among the circuit courts to necessitate this Court's review of this issue. The Court of Appeals applied the law set forth by this Court in *Village of Willowbrook* for an Equal Protection claim based upon a "class of one." The Court of Appeals reached a result that did not favor the petitioners. There is no basis in law for petitioners request for review of this issue.

Petitioners also argue that there was no rational basis for the difference in treatment of Timijane and Tabitha. The Court of Appeals considered the evidence, and found that a rational basis existed. The Court of Appeals noted that Marinack testified that he kept Tabitha at school because her mother had returned his earlier telephone call before the end of the school day, and had requested that he keep Tabitha at school. App. A, 21a. Marinack explained that he had an opportunity to call Tabitha's mother because he found the cigarettes in Tabitha's locker first and earlier in the school day. App. A, 21a. Marinack further testified that he did not keep Timijane at school because he had not spoken with her mother before the end of the school day, and because she stated that she had to take the bus home. App. A, 21a. Based upon those circumstances, the Court of Appeals found that the differing treatment of Tabitha and Timijane was rational. App. A, 21a. The lower court also rejected petitioners' claim that the respondents treated Timijane and Tabitha differently by meting out differing punishments. App. A, 22a-23a. The lower court

found the evidence submitted by petitioners to be inadmissible hearsay, and insufficient to prove such claims. App. A, 22a. The lower court also found that there was insufficient evidence to support a finding that the respondents acted with deliberate indifference in meting out the differing punishments. App. A, 23a.

The evidence establishes that there was a rational basis for the differing treatment of Timijane and Tabitha, specifically the failure to Marinack to telephone Timijane's parents and keep her after school as he did Tabitha. Because a rational basis exists, the respondents' equal protection claim was properly dismissed.

CONCLUSION

For the foregoing reasons, Petitioners' Writ of Certiorari should be denied in that the petitioners have not raised any novel or monumental issues warranting review by this court. Rather, the Federal Circuit Decision is consistent with and mandated by well established precedent. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,
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